No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,
Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR UNITED STATES SENATORS SULLIVAN AND MURKOWSKI AND REPRESENTATIVE YOUNG AS AMICUS CURIAE IN SUPPORT OF PETITIONER JOHN STURGEON

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INTEREST OF AMICUS CURIAE[1]

Amici curiae United States Senators Dan Sullivan and Lisa Murkowski and Representative Don Young represent Alaska. Senator Murkowski is Chairman of the Senate Committee on Energy and Natural Resources, which has jurisdiction over federal public lands, including the National Parks. Senator Sullivan is a member of the Senate Committee on Environment and Public Works. Both committees provide legislative oversight of the Department of the Interior. Representative Young, the longest serving current member of the Alaska congressional delegation, served in Congress at the time of enactment of the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. No. 96-487, 94 Stat. 2371 (1980), 16 U.S.C. § 3101 et seq., the statute at issue in this case, and contributed to the passage of the bill.

Amici curiae thus are positioned to provide the Court with the background and history which facilitates the proper interpretation of Section 103(c) of ANILCA.

Additionally, amici curiae have a solemn and abiding interest in safeguarding the proper construction of the three landmark Acts which define the federal government's relationship to the State of Alaska, and the people of Alaska: the

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party or person other than amici curiae or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

Alaska Statehood Act, Alaska Native Claims Settlement Act, and ANILCA. To this end, amici curiae are committed to seeing that federal courts and agencies honor the commitments made in all three Acts and that federal agencies faithfully comply with the limits to their power imposed by Congress.

Finally, recent experience has shown that federal agencies, with alarming frequency, strain to find ambiguity in even the plainest words. Agencies then claim they are entitled to deference under *Chevron*[2] to support their interpretations of those words. In the end, the result is an expansion of agency authority far beyond that which Congress affirmatively delegated. When courts defer to implausible agency interpretations of statutory language, they are not only allowing the executive branch to increase federal authority unilaterally, they are undermining the separation of powers – the balance so carefully struck in the Constitution – and making it nearly impossible for Congress to effectively limit executive agency authority. That is what has happened in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a series of landmark Acts affecting Alaska lands, Congress carefully and deliberately balanced Alaska's interests with conservation concerns.[3] To

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[2] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[3] Eric Todderud, *The Alaska Lands Act: A Delicate Balance Between Conservation and Development*, 8 Pub. Land L. Rev. 143 (1987).

achieve this balance, Congress set out firm limits on federal authority to safeguard Alaska's sovereign right to manage its lands and to enable Alaska's Native peoples the opportunity to occupy, use and develop their aboriginal homeland. Not surprisingly the executive branch, feeling constrained by the limits Congress has placed on that authority, has pushed and tested the boundaries of its authority during much of Alaska's history. Agencies, after all, do what they regard as expedient and necessary, backing down only when the courts tell them they have overreached.

In this case, the National Park Service ("Park Service") misread Section 103(c) of ANILCA to expand its authority and promulgate regulations that ban the use of hovercrafts on State of Alaska lands located within a National Preserve.[4]

The Park Service's interpretation of Section 103 takes a provision that limits federal authority and transforms it into a wellspring of power over Alaska's lands and resources. Worse, over the last several years, the Park Service has improperly asserted the right to impose restrictions on all nonfederal lands located within conservation system units in Alaska.

Unfortunately, rather than limit federal agency power, two federal courts have endorsed this

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[4] Amici are not asking this Court to overturn or revisit the Ninth Circuit's "Katie John" subsistence decisions: *John v. United States* (Katie John III), 720 F.3d 1214 (9th Cir. 2013), *John v. United States* (Katie John II), 247 F.3d 1032 (9th Cir. 2001) (en banc) (per curiam), or *State of Alaska v. Babbitt* (Katie John I), 72 F.3d 698 (9th Cir. 1995).

unwarranted expansion of federal jurisdiction. The Ninth Circuit's opinion, in particular, will sow confusion and tempt the executive branch to continue eroding the line between the federal and state spheres in contravention of this Court's federalism jurisprudence.

The Ninth Circuit's decision should be vacated because it violates the plain meaning of Section 103(c) and subverts the intent of Congress. The purpose in Section 103(c) is to insulate nonfederal lands located within conservation system units from Park Service regulatory control. This provision therefore honors the commitments made by Congress to the State of Alaska and Native Corporations in prior legislation.

The Ninth Circuit's opinion, however, gives the Park Service, and other federal land management agencies, *carte blanche* to undermine authority expressly reserved by Congress to Alaska and Native Corporations. Had Congress intended to encroach on Alaska's sovereignty over land use, it would have said so affirmatively.

In short, the Park Service's unilateral expansion of its authority over Alaska's lands not only usurps Congress' legislative authority in violation of the separation of powers, it also comes at great expense to the State of Alaska. It is time for this Court to put to an end the federal government's long history of wrongfully seizing power over the State of Alaska's lands and resources to the detriment of the State's citizens, such as Mr. Sturgeon.

BACKGROUND

Contrary to the Park Service's claim, ANILCA is not just a statute designed to protect federal lands.[5] *See* Brief in Opposition ("BIO") at 5, 17; *Sturgeon v. Masica*, 768 F.3d 1066, 1075-76 (9th Cir. 2014). Rather, ANILCA serves as the final Act of Congress dealing with federal land disposal in Alaska. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 549 (1987) ("ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska, a process begun with the Statehood Act in 1958 and continued in 1971 in ANCSA."); *id.* at 550 & n.18 (citing H.R. Rep. No. 96-97, pt. 1, p. 135 (1979)). Because ANILCA is a direct outgrowth of the Alaska Statehood Act ("Statehood Act"[6]) and the Alaska Native Claims

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[5] *See* James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 Rocky Mtn. Min. L. Inst. 7-1–7-3 (2015), available at: www.rmmlf.org/AI61-Ch7.pdf.

> It would be a significant misstatement to describe ANILCA solely as a statute creating national parks, refuges, wilderness areas, and the like, *without recognizing that perhaps 75% of its content served its other purposes*. ANILCA embodies significant congressional compromise. ANILCA's massive conservation withdrawals *could not be enacted without an accommodation of Native and state needs*. For these reasons, ANILCA consists of a carefully crafted political balance between the creation of new or enlarged conservation system units (CSU) and the protection of Native, state, and other land uses on these lands and other lands.

Id. at 7-33-7-34. (emphasis added) (citations omitted).

[6] Pub. L. No. 85-508, 72 Stat. 339 (1958).

Settlement Act ("ANCSA"[7]), ANILCA cannot be read in isolation of the commitments made by Congress to the State of Alaska ("Alaska"), and to Alaskans, in these prior Acts.[8] *See Amoco*, 480 U.S. at 552-55. The ANILCA provision at the heart of this case, Section 103(c), must therefore be interpreted in light of the structure and purposes of the Statehood Act and ANCSA.

Statehood Act

Alaska's admission to the Union did not come easily. After Alaska's purchase in 1867, it took almost fifty years before it was organized as a federal territory, and it was not seriously considered as a candidate for statehood until after the Second World War. A desire to control Alaska's lands and resources became a coalescing force that motivated many to support the statehood effort. *See Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45, 47 (1962).

Opponents to statehood raised several major objections, including Alaska's small population, narrow tax base, and the questionable financial means to govern itself. *Trustees for Alaska v. State*, 736 P.2d 324, 335-36 (Alaska 1987).

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[7] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629).

[8] Statutes should be interpreted in light of "any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006); *Watt v. Alaska*, 451 U.S. 259, 266 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.").

To overcome these objections, advocates of statehood argued that Congress should convey significant lands to the new state in the hope that the lands would generate enough revenue so the State could govern itself. This argument won the day.

> That Congress recognized the financial burden awaiting the new state is clear from its debates. It is equally clear that the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden. Congress, then, granted Alaska the mineral estate with the intention that the revenue generated therefrom would help fund the new state's government.

Id. at 337.

Congress eventually agreed to admit Alaska into the Union on particular terms set out in the Statehood Act. *Id.* at 337. The Act's enactment, however, did not complete the statehood process; before Alaska could enter the Union, the Compact required ratification by the "State and its people." Statehood Act, § 8(b), 72 Stat. 344 (1958). Based on the promises embedded in the Statehood Act, Alaskans consented to Statehood on August 26, 1958, when they ratified the Compact.[9] *State v. Lewis*, 559 P.2d 630, 640 (Alaska 1977).

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[9] The State of Alaska was "admitted into the Union on an equal footing with the other States," and its boundaries were (continued...)

The centerpiece of the Compact between the State of Alaska and the United States is Alaska's right to select lands and manage these lands for the public's benefit.[10] *See Trustees for Alaska*, 736 P.2d at 335 ("The primary purpose of the statehood land grants contained in section 6(a) and (b) of the Statehood Act was to ensure the economic and social well-being of the new state.").[11] It was left to the

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defined as "all the territory, together with the territorial waters appurtenant thereto, now included in the Territory of Alaska." Statehood Act §§ 1, 2, 72 Stat. 339. Congress also made the Submerged Lands Act of 1953, 67 Stat. 29, as amended, 43 U. S. C. § 1301 *et seq.* (1982 ed. and Supp. III), applicable to the State. Statehood Act § 6(m), 72 Stat. 343.

[10] This Court has characterized the land grant provisions of statehood acts as a "'solemn agreement' which in some ways may be analogized to a contract between private parties," *Andrus v. Utah*, 446 U.S. 500, 507 (1980), and as "an unalterable condition of the admission, obligatory upon the United States." *Beecher v. Wetherby*, 95 U.S. 517, 523 (1877).

[11] Alaska Territorial Senator William Egan commented on future development of "known deposits of almost every type of mineral" as the source of future Alaskan income in response to Representative Miller's questions on whether Egan could "see where you would get much income out of this 103 million acres you might select around, bearing in mind most of the forests and good land has been set aside by the [federal] Government now, or by the military? How much income would you derive from that to begin with?" *Statehood for Alaska: Hearings Before the Subcommittee on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 85th Cong., 1st Sess. 201-02 (1957) (remarks of Rep. Miller and William Egan, Alaska Territorial Senator and President of the Alaska Constitutional Convention). *See also United States v. Atl. Richfield Co.*, 435 F. Supp. 1009, 1016 (D. Alaska 1977) ("The intent of Congress was, of course, to provide the new state with a solid economic foundation."); 104 Cong. Rec. 12,035 (1958) (continued...)

new state to make the most of its selection options and to fully utilize these lands in order to satisfy the State's budgetary obligations and the needs of Alaskans.

For these reasons, Alaska guards the rights conferred under the Statehood Act and views the management of its lands, and access to them, as an essential aspect of its sovereignty which sustains Alaska's economy, culture, and way of life.[12] Fidelity to the commitments made in the Statehood Act mandate that the State, Alaskans, and Alaska's congressional delegation must vigorously contest

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(continued)
(statement of Senator Kuchel) ("[T]he State of Alaska will be able to make maximum use of the property which it will obtain under the bill from the Federal Government.").

[12] *See, e.g.*, Alaska Const. art. VIII, §§ 1, 2, 6; Alaska Stat. §§ 38.04.005 - .015 (setting out the State's land management policies); Alaska Stat. § 44.99.100(a) (declaring that the state economic development policy is to "further the goals of a sound economy, stable employment, and a desirable quality of life, the legislature declares that the state has a commitment to foster the economy of Alaska through purposeful development of the state's abundant natural resources and productive capacity.");

> The legislature, acting under art. VIII, sec. 1 of the Constitution of the State of Alaska, in an effort to further the economic development of the state, to maintain a sound economy and stable employment, and to encourage responsible economic development within the state for the benefit of present and future generations through the proper conservation and development of the abundant mineral resources within the state . . ."

Alaska Stat. § 44.99.110

any unwarranted expansion of federal jurisdiction that interferes with the use of and access to Alaska's lands and resources.[13] After all, the rights granted to the State of Alaska in the Statehood Act cannot – *and should not* – be unilaterally diminished or abrogated by a federal agency. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009) ("'[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event to suggest that subsequent events somehow can diminish what has already been bestowed'. And that proposition applies *a fortiori* where virtually all of the State's public lands . . . are at stake.") (quoting, in part, *Idaho v. United States*, 533 U.S. 262, 284 (2001) (Rehnquist, J. dissenting)); *see also State of Alaska v. Ahtna, Inc.*, 891 F.2d 1401, 1404, 1406 (9th Cir. 1989).[14]

ANCSA

In 1964 and 1965 the State selected, and the Secretary of the Interior tentatively approved, approximately 1,650,000 acres of land on the Arctic Slope. The State selected these lands because of reports of oil deposits. Drilling on state lands

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[13] *See* 158 Cong. Rec. 15811-15816 (2011) (remarks of Sen. Murkowski).

[14] Courts have also long-recognized that school lands legislation, which are analogous to statehood compacts, are to be construed liberally in favor of the recipient state. *Utah v. Andrus*, 486 F. Supp. 995, 1001-02 (D. Utah 1979) (citing *Wyoming v. United States*, 255 U.S. 489, 508 (1921)). This is "to place the new states on an 'equal footing' with the original thirteen colonies and to enable the state to [fund the schools]." *Id.* at 1002 (citing *Lassen v. Arizona Highway Dep't*, 385 U.S. 458, 463 (1967)).

shortly thereafter confirmed one of the largest oil fields ever discovered. After this discovery, in 1969, Alaska auctioned oil and gas leases on the State-selected Arctic Slope lands. The lease sale was vigorously protested. *Atl. Richfield Co.*, 435 F. Supp. at 1017-18.

Partly in response to the mounting protests, the Secretary of the Interior instituted a freeze, suspending federal patenting and approval of Alaska's selections pending a legislative settlement of the controversy. *Id.* at 1018. Because the administratively imposed freeze was a serious threat to Alaska's economy, Alaska turned to Congress for a solution. At that time, Native leaders had also concluded they should petition Congress for a prompt legislative settlement of their land claims.

Eventually, all interests obtained a legislative settlement that included substantial grants of land in addition to monetary compensation for the extinguishment of Native claims. *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 995-97 (9th Cir. 1994); *City of Angoon v. Marsh*, 749 F.2d 1413, 1414-15 (9th Cir. 1984). The express purpose of the Alaska Native Claims Settlement Act was to meet the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). Congress found that a settlement had to be accomplished "rapidly, with certainty, . . . [and] without litigation . . ." *Id.* at § 1601(b).

Key provisions of ANCSA include Section 4, which extinguished Native land claims. *Id.* at § 1603. As consideration for the extinguishment, Section 6 provides for a cash settlement of $962,500,000 to be paid over a period of years. *Id.* at

§ 1605. In addition to the monetary grant, ANCSA granted Alaska Natives fee title to more than 40 million acres of lands to be selected by Native villages and regional corporations from lands in Alaska withdrawn for that purpose. *Id.* at § 1611. All future revenues to be derived from the land patented to the Natives are the property of the Native corporations. *Id.* at § 1606(i).

ANCSA was unique in the realm of Native American land claim settlements because it vested control of the land directly in the elected representatives of Alaska's Native peoples, and not in the federal government as trustee. It was fully expected that some of this land would be developed for its vast natural resource potential.

ANILCA

The final chapter in the federal government's land allocation process occurred in 1980 when Congress enacted ANILCA and transferred over 100 million acres of federal lands in Alaska (an area larger than the State of California) into various conservation units, which precluded development on much of these lands.[15] The legislation followed several years of contentious debate over the proper use and disposition of federal lands in Alaska.

The most forceful concerns related to proposed legislation were raised by the Alaska delegation. Congressman Young objected that without adequate protections to limit federal jurisdiction over state

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[15] Under ANILCA, various federal agencies were tasked with managing national parks, wildlife refuges, wild and scenic rivers, national trails, and national monuments. 16 U.S.C. § 3102(4).

owned lands, the proposed legislation would violate the promises made by Congress to Alaska and Alaskans in the Statehood Act and ANCSA.[16]

The Alaska delegation was also extremely concerned that proposed amendments to the legislation would harm Alaska's economy and culture. As Congressman Young queried during one debate: "Can you imagine having to go out on the land you have been able to utilize for the last 300 years, you and your ancestors, and have some little person in a green uniform say, 'No, you cannot, you have to have a permit'?"[17]

Thus, to enact the legislation, the advocates of ANILCA had to be willing to accept a balance between conservation of federal lands and economic development of State and Native Corporation lands while also honoring the State of Alaska's sovereign right to manage its lands free of intrusive federal oversight.[18] This goal is reflected in the Act's "statement of purpose," which provides:

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[16] 125 Cong. Rec. 11,457 (1979) (Congressman Young argued that proposed amendments would deprive Alaskans of the promises made by Congress); S. Rep. No. 96-413, at 446 (1979) ("The bottom line of this situation is the denial of the full range of use of [State and Native] lands and hence, the *de facto* taking of property rights which have been granted to the State and to the Native corporations by the Alaska Statehood Act and by the Alaska Native Claims Settlement Act.").

[17] 125 Cong. Rec. 11,457 (1979).

[18] 126 Cong. Rec. 30,498 (1980); *see generally* James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 Rocky Mtn. Min. L. Inst. at 7-33-35.

> This Act provides *sufficient protection for the national interest in the scenic, natural, cultural and environmental values* on the public lands in Alaska, *and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska* and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a *proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition*[.]

16 U.S.C. § 3101(d)(emphasis added). To carry out this objective, ANILCA contains provisions designed to preserve the commitments made to the State of Alaska and Native Corporations in the Statehood Act and ANCSA.

For example, ANILCA provided that no further withdrawals would follow except through heavily circumscribed formal processes. This condition was set forth in what is commonly referred to as the "no-more" clause,[19] providing that no federal agency

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[19] This clause provides that,

> No future executive branch action which withdraws more than five thousand acres, in the aggregate, of public lands within the State of Alaska shall be effective except by compliance with this subsection. To the extent authorized by existing law, the President or the Secretary may withdraw public lands in the

(continued...)

may take any action that "withdraws" additional public lands for preservation. 16 U.S.C. § 3213(a).

ANILCA contains many other provisions that were also intended to limit federal oversight of Alaska lands and Native Corporation lands and to ensure that Alaska's unique needs were honored by federal agencies. These provisions were deemed critical by Congress because the conservation system units created or enlarged by ANILCA – covering over 100 million acres of national parks, refuges, preserves, and monuments – surrounded 40 million acres of State and Native Corporation lands, which became islands within the federally managed conservation system units. *See* James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 Rocky Mtn. Min. L. Inst. at 7-33-35.

In addition to these protections, Section 103(c) is, perhaps, the most important provision in ANILCA from a federalism perspective because it (1) protects the nonfederal lands located within conservation units from federal oversight and (2) confirms the commitments made by Congress in the Statehood Act and ANCSA.

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> State of Alaska exceeding five thousand acres in the aggregate, which withdrawal shall not become effective until notice is provided in the Federal Register and to both Houses of Congress. Such withdrawal *shall* terminate unless Congress passes a joint resolution of approval within one year after the notice of such withdrawal has been submitted to Congress.

16 U.S.C. § 3213(a) (emphasis added).

Section 103(c) of ANILCA

In Section 103(c), Congress made clear that only "public lands" (*i.e.*, federal lands[20]) within the boundaries of conservation system units (*e.g.*, national parks) "shall be deemed to be included as a portion of such unit," and no lands owned by "the State, [a] Native Corporation, or [a] private party shall be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Section 103(c) therefore provides that *only federal lands and waters* falling within conservation system unit boundaries are considered a part of the unit, thus excluding Alaska and Native Corporation lands from Park Service oversight. 16 U.S.C. §§ 3103(c), 3102(1)-(3), (11).

There are two primary reasons why this provision was added to ANILCA. *First*, Congress wanted to reinforce Alaska's and Native Corporations' right to manage their respective resources and lands, which necessarily includes access to lands conveyed under the Statehood Act and ANCSA.[21] *Second*, Congress understood that

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[20] Under ANILCA, "the term 'public lands' means land situated in Alaska which . . . are Federal lands." 16 U.S.C. § 3102(3). "The term 'Federal land' means lands the title to which is in the United States." 16 U.S.C. § 3102(2). And "[t]he term 'land' means lands, waters, and interests therein." 16 U.S.C. § 3102(1). In short, public lands are lands, waters, and interests therein, the title to which is in the United States. *Amoco Prod. Co.*, 480 U.S. at 548 n.15.

[21] ANILCA "provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). To this end, ANILCA protects mining operations, *see, e.g.*, 16 U.S.C. § 3170; promotes oil and

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Alaska is very different from other states and that its vast landscape, sparse population, subsistence lifestyles, and lack of infrastructure called for unique rules that would not apply to federal parks in the lower-48.[22]

For many years after ANILCA was enacted, the federal government, including the Park Service, understood well the limitations imposed by Congress in Section 103(c). For example, the Park Service restricted the applicability of its regulations to "'federally owned' lands . . . within park area boundaries." National Park System Units in Alaska, 46 Fed. Reg. 31,836, 31,843 (June 17, 1981) (citing 126 Cong. Rec. 11,115 (1980) and 126 Cong. Rec. 15,130-31 (1980)). The Park Service elaborated: "[t]hese regulations would not apply to activities

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gas development, *see, e.g.*, *id.* § 3142(a)-(b); and supports the Alaska timber industry, *see, e.g.*, *id.* § 539d. *See also Marsh*, 749 P.2d at 1418.

[22] For example, ANILCA grants special authorization for hunting in ANILCA national preserves, 16 U.S.C. § 410hh-2; it protects commercial fishing rights and related uses in designated ANILCA monuments and preserves, *id.* § 410hh-4; it allows commercial fishing and related uses within ANILCA National Wildlife Refuge System units, *id.*; and it explicitly permits traditional modes of surface transportation, including snowmobiles and motorboats, on ANILCA public lands for subsistence purposes, *id.* § 3121. In short, ANILCA recognizes that lands in Alaska must be managed differently from lands elsewhere, and the statute provides for this by imposing numerous specific restraints on federal authority over public and nonpublic lands. *See* James D. Linxwiler & Joseph J. Perkins, *A Primer on Alaska Lands*, 61 Rocky Mtn. Min. L. Inst. at 7-4, 7-33-35.

occurring on State lands. Similarly, these regulations would not apply to activities occurring on Native or any other non-federally owned land interests located inside park area boundaries." *Id.*

Given this history, it is not surprising that the Justice Department admitted that it could *not* prosecute an individual who had taken a seal from Alaskan waters for a ceremonial potlatch. *See* Brief of the United States, *United States v. Brown,* No. 94-30019, 1994 WL 16122537, at *5-6 (9th Cir. May 17, 1994) (Justice Department moved for dismissal because it concluded that the federal government neither "own[ed] the submerged land" nor had "legislative jurisdiction" over such lands).

Not satisfied with this limitation on its authority, the Park Service eventually circumvented ANILCA's restrictions on federal authority by issuing 36 C.F.R. § 1.2(a)(3), which is the regulation at the heart of this case. The Park Service declared "that NPS regulations otherwise applicable within the boundaries of a National Park System unit apply on and within waters subject to the jurisdiction of the United States located within that unit, including navigable waters and areas within their ordinary reach . . . irrespective of ownership of submerged lands, tidelands or lowlands, and jurisdictional status." General Regulations for Areas Administered by the National Park Service and National Park System Units in Alaska, 61 Fed. Reg. 35,133, 35,136 (July 5, 1996) (quoting 36 C.F.R. § 1.2(a(3)). In so doing, the Park Service's power grab expanded its jurisdiction over Alaska lands and resources in blatant disregard of the "balance" Congress struck in ANILCA.

ARGUMENT

The Park Service's regulation of nonfederal lands within conservation system units in Alaska violates the plain meaning of Section 103(c), disregards Congress' intent in ANILCA, ANCSA, and the Statehood Act, and offends a hallmark of federalism: State control over land use decision-making.

I. SECTION 103 OF ANILCA CLEARLY PROHIBITS PARK SERVICE REGULATORY JURISDICTION OVER NON-FEDERAL LANDS AND WATERS

According to the Park Service, the case should be resolved based on *Chevron* deference. To determine if an agency is entitled to deference, *Chevron* step one requires courts to examine "the language of the statute," and "[t]he inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quotations omitted). When determining the meaning, the Court must look at how the words are used in the entire statutory scheme:

> [O]ftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, the Court must read the words in their context and with a view to their place in the overall statutory scheme . . . Our duty, after all, is to construe statutes, not isolated provisions.

King v. Burwell, 135 S. Ct. 2480, 2483, 2489 (2015) (quotations and citations omitted)

Thus, the proper *Chevron* step one inquiry centers on whether Section 103(c), when construed in the context of ANILCA, grants the Park Service the authority to trample on Alaska's sovereignty and diminish the property rights of Native Corporations. *Cf.*, *Barnhart*, 534 U.S. at 442 ("The question presented is whether the Coal Act permits the Commissioner to [take specified action]"); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("[R]espondents must show a textual commitment of authority to the EPA[.]").

As explained by Sturgeon, ANILCA's text, purpose, structure, and legislative history conveys Congress' unmistakable intent to preclude the application of federal conservation regulations to State and private inholdings within conservation system units – *i.e.*, Congress specified in ANILCA that nonfederal lands within conservation system units are not subject to regulation as though they are part of the National Park System. Petitioner's Opening Brief at 21-30.

A. The Plain Text of Section 103(c) Does Not Authorize the Park Service to Regulate State and ANCSA Lands Within Conservation System Units.

Section 103(c) is clear and concise. It provides:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after

> December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c).

The statute thus provides that: (1) only "public lands"[23] are part of conservation system units in Alaska; (2) federal land management agencies have no authority to exercise regulatory control over State, Native Corporation, and private lands located within those conservation system units; (3) the *only* lands that may be administered as part of the National Park System are those that have been conveyed to the United States; and (4) while the Park Service cannot regulate nonfederal lands within conservation system units, federal laws of general applicability, like the Clean Air Act or Clean Water Act, do apply to nonfederal lands *because those general laws are not* "applicable solely to public lands."

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[23] Public lands are lands, waters, and interests therein, the title to which is in the United States. *Amoco Prod. Co.*, 480 U.S.at 548 n.15.

This construction of Section 103(c) is supported by the purpose of ANILCA, which delegated certain responsibilities to federal land management agencies to conserve and protect federal lands while ensuring that nonfederal lands within conservation system units would not be managed by these same federal agencies as if they were federally owned.[24] *Marsh*, 749 F.2d at 1417 (observing that "the drafters of ANILCA never intended the mere location of boundary lines on maps delineating the overall conservation system to indicate that private lands . . . were to be treated as public lands").

The structure of ANILCA also supports this plain reading, as demonstrated by the fact that (1) ANILCA is a direct outgrowth of the Statehood Act and ANCSA; and (2) in ANILCA Congress sought to honor the commitments made to the State of Alaska and Native Corporations in the Statehood Act and ANCSA. *See, e.g.*, 16 U.S.C. §§ 3101(c)-(d); 3111, 3126, 3148, 3150, 3161, 3207(2); *cf.*, *Wilderness Soc'y v. Griles*, 824 F.2d 4, 7 (D.C. Cir. 1987) (observing that Alaska's "[n]avigable waters and their submerged lands are subject to state control in all cases"). In addition, to implement this commitment, numerous statutory provisions in ANILCA expressly prohibited federal agencies like the Park Service from adopting regulations that would interfere with Alaska's sovereign right to manage State lands for the economic and social needs of the State, and by expressly safeguarding

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[24] *See* 126 Cong. Rec. 30,498 (1980) (amending the bill to "[s]pecify[] that only public lands (and not State or private lands) are to be subject to the conservation system unit regulations applying to public lands").

Alaska's sovereign authority over nonfederal lands. *See* 16 U.S.C. §§ 3101(d), 3102(1), 3103(c), 3111-14, 3117-19.

B. Nothing in Legislative History Supports the Ninth Circuit's Holding that Section 103(c) Authorizes the Park Service to Apply National Regulations to Nonfederal Lands.

The Park Service, like the Ninth Circuit, may attempt to misrepresent legislative history to distort the plain meaning of the Section 103(c). *Sturgeon*, 768 F.3d at 1078-79. The Court should reject such an attempt because the legislative history is unequivocal: Congress' primary objective in adopting Section 103(c) was to prevent nonfederal lands newly-surrounded by conservation system units from Park Service oversight and regulation. *See Marsh*, 749 F.2d at 1417-18 ("section 103(c) was added to ANILCA . . . for the *express purpose* of 'specifying that *only public lands* (*and not State owned or private lands*) are to be subject to the conservation system unit regulations applying to public lands'") (quoting, in part, 126 Cong. Rec. 30,498) (emphasis added).

Section 103(c)'s House sponsor stated that he wanted to "make clear beyond any doubt that any State, Native, or private lands, which may lie within the outer boundaries of the conservation system unit are not parts of that unit and are not subject to regulations which are applied to public lands, which, in fact, are part of the unit." 125 Cong. Rec. 11,158 (1979); *see also* S. Rep. No. 96-413, at 303 (1979) ("Those private lands, and those public lands, owned by the State of Alaska . . . are not to be construed as subject to the management regulations

which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands.").

And while nonfederal lands located within conservation system units would not be subjected to any Park Service regulations, Congress also wanted to make clear that laws of general applicability *would apply* to such lands. S. Rep. No. 96-413, at 303 (1979) (suggesting that Section 103(c)'s use of "solely" was to clarify that "Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act . . . would be applicable to private or non-Federal public land in holdings within [CSUs] . . . and thus are unaffected by the passage of the bill").

Accordingly, Congress did not grant the Park Service the authority to transform Section 103 (c) into a potent source of far-reaching regulatory authority over 40 millions of acres of State, Native, and private lands and resources located within conservation system units.

C. Congressional Silence Regarding the Scope of Regulatory Jurisdiction Does Not Entitle Administrative Agencies To Deference.

In its opposition to Sturgeon's Petition for Certiorari, the Park Service claims that the Court should disregard the plain meaning of Section 103(c) and grant it deference because Congress did not expressly forbid Park Service regulation of nonfederal lands within conservation units. BIO at 19.

By asserting authority to do whatever Congress did not explicitly forbid, the Park Service turns *Chevron* on its head. Were this Court to accept such a formulation and "*presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*); *Chamber of Commerce v. NLRB*, 721 F.3d 152, 160 (4th Cir. 2013) ("we do not find that *Chevron*'s second step is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power.") (emphasis in original) (quotation and citation omitted); *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) (rejecting the federal appellees' argument that "congressional 'silence' creates an implicit delegation under *Chevron*").

Yet the Park Service blithely contends that "the Secretary is entitled to deference to reasonable interpretations of the scope of her authority under ANILCA." BIO at 19. But, again, agencies do not possess authorities beyond those conferred in the substantive provisions enacted by Congress. *See Gonzales v. Oregon*, 546 U.S. 243, 264-65 (2006) ("It would go . . . against the plain language of the text to treat a delegation for the 'execution' of [the Attorney General's] functions as a further delegation to define other functions well beyond the [statute's] specific grants of authority."); *Am. Trucking Ass'ns*, 531 U.S. at 468 (finding it "implausible that Congress would give to the EPA through . . . modest words the power to determine whether implementation costs should moderate national air quality standards."); *NRDC v. EPA*, 749

F.3d 1055, 1063 (D.C. Cir. 2014) ("we have consistently held that EPA's authority to issue ancillary regulations is not open-ended, particularly when there is statutory language on point.").

Further, to assert, as the Park Service does, that it has broad power to define the scope of its authority under ANILCA "is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent." *Ry. Labor Exec. Ass'n*, 29 F.3d at 671. There should be no dispute that the Park Service "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate."); *Friends of the Earth v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006) ("EPA may not avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.") (citation and quotation omitted).

Deference is a powerful thing, and unsurprisingly the executive branch often seeks to create ambiguity where none exists, the better to effectuate its own policies rather than those of the Congress. Left unchecked, this dynamic undermines Congress' legislative function, ceding it instead to the federal executive. That is how the balance of power between the branches of the federal government is distorted. No meaningful system of checks and balances can exist where the executive branch can vest itself with legislative powers. Nor can the system of checks and balances work if the

judicial branch does not stop unwarranted power grabs. And while agencies would prefer to have the leeway to interpret statutes according to their policy preferences, the Constitution does not provide them such authority. This is particularly true when, as here, the plain meaning of Section 103(c) prohibits the Park Service from regulating nonfederal lands in Alaska that are located within conservation system units.

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In sum, *Chevron* honors the bedrock principle that statutes control agency action. In step one, courts examine the words of the statute to determine whether they resolve the dispute. When a particular agency power is absent from the governing statute there is no ambiguity and no need to proceed to *Chevron* step two. The controlling words in this case are clear: Congress did not authorize the Park Service to apply regulations to State of Alaska, Native, and private lands within conservation system units. Accordingly, the Park Service's promulgation and enforcement of 36 C.F.R. § 1.2(a)(3) clearly exceeded its statutory authority.

II. EVEN IF *CHEVRON* STEP TWO GOVERNS, THE PARK SERVICE'S INTERPRETATION IS BASED ON AN IMPERMISSIBLE CONSTRUCTION OF THE STATUTE.

The text of Section 103(c), the overall structure and purpose of ANILCA, and legislative history plainly show that Congress prohibited the Park Service from regulating nonfederal lands within conservation system units as though such lands are part of the National Park System. But even if this

Court finds ambiguity in the statute, the Park Service's expansive interpretation of Section 103(c) should be rejected because it is based on a construction of ANILCA that impairs the State of Alaska's sovereign right to manage state lands and unduly interferes with Native Corporations' statutory right to access and develop Native owned lands.

A. The Park Service's Construction of Section 103(c) Encroaches on Traditional State Power in Violation of Congressional Intent.

Courts must reject an agency's statutory interpretation that "alters the federal-state framework by permitting federal encroachment upon a traditional state power" without a "clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 172-73 (2001). Indeed, it is well established that deference should not be afforded to a federal agency that seeks to strip power properly vested with states. *Id.* at 174 (courts should disregard an agency's interpretation if it "would result in a significant impingement of the States' traditional and primary power over land and water use.").

Here, it cannot be disputed that Alaska's ownership of its submerged lands is an "essential attribute of sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann,* 133 S. Ct. 2120, 2132 (2013) (quotation omitted). Nor can it be disputed that land use regulation is "perhaps the quintessential state activity," *FERC v. Mississippi,* 456 U.S. 742, 768 n.30 (1982), and has been "traditionally performed" by state and local governments. *Hess v.*

Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994). The right to regulate and manage State lands and resources is, therefore, an essential component of Alaska's sovereignty.

This is especially true given the commitments made by Congress in the Statehood Act, which is not a typical piece of legislation. Instead, it is a Compact between sovereigns and has attributes of a contractual relationship. *See, e.g., Beecher,* 95 U.S. at 523. For this reason, the executive branch does not have the right to unilaterally amend central commitments made by Congress to induce Alaskans to accept statehood, such as the management and control of Alaska's natural resources, which lie at the heart of the State's sovereign interests. *Cf., Hawaii,* 556 U.S. at 176.

But by applying federal regulations designed to control the use of federal lands located in park systems across the United States to lands owned by the State of Alaska, the Park Service is diminishing Alaska's land use decision-making authority. In addition to restricting the use of hovercrafts on state waters, the Park Service is now requiring Alaska to seek federal permission to conduct scientific research on caribou and salmon *on state-owned lands.*[25] Brief Amicus Curiae of Alaska at 17.

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[25] And the Park Service recently published a notice of proposed rulemaking to abrogate an Alaska-specific exemption from certain nationwide oil and gas rules, making the rules enforceable to State lands. *See* General Provisions and Non-Federal Oil and Gas Rights, 80 Fed. Reg. 65,572 (Oct. 26, 2015). The rulemaking explained "that because these regulations are generally applicable to NPS units nationwide and to non-federal interests in those units, they are not (continued...)

The Ninth Circuit has therefore approved a regime in which Alaska may not access its own lands and resources unless it first obtains permission from a federal agency. This grant of plenary power to the Park Service nullifies the strict limitations on federal jurisdiction over nonfederal lands imposed by Congress in ANILCA. It also upsets the compromise achieved in ANILCA, which balanced the federal government's desire to protect public lands with the State of Alaska's need for economic development and meaningful access and control of its resources. *See* 16 U.S.C. §§ 3103, 3111-14, 3117-19; *see also Marsh*, 749 P.2d at 1416-18 & 1418 n.5 (observing that Section 103 "specifically indicat[es] that [State of Alaska and native lands] are not to be restricted by virtue of their location within the boundaries of a conservation system unit"). And it violates the Statehood Act's central commitment to Alaska, which granted the state the right to make land use decisions for the benefit of its people. *Trustees for Alaska*, 736 P.2d at 335. Sovereignty demands no less. *Hawaii*, 556 U.S. at 176.

In short, the Park Service's interpretation of Section 103(c) takes a provision that limits federal authority and transforms it into an unchecked source of power (because of deference) over State of Alaska lands. While ANILCA assigns many duties to various federal agencies, it does not follow that

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'applicable solely to public lands within [units established under ANILCA],' and thus are not affected by section 103(c) of ANILCA." *Id.* at 65,573 (quoting *Sturgeon* v. *Masica*, 768 F.3d 1066, 1077-78 (9th Cir. 2014)).

the Park Service can override the specific assignment of powers reserved to Alaska concerning land use decisions on Alaska's lands. Such a drastic change in the amount of control exercised by the federal government over all nonfederal lands within conservation system units in Alaska can only come from Congress. *Cf., Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) (requiring clear evidence of congressional intent to change the status quo). After all, a "heavy regulatory burden on the States" simply cannot be attributed to Congress absent solid "textual support" and a "clear statement" from Congress. *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 718 (1994). No such textual support exists in ANILCA. The Park Service therefore cannot rely on Section 103(c), which limits federal power. Nor can it transform a general grant of power to diminish Alaska's sovereignty by circumventing commitments made by Congress to Alaska in the Statehood Act.

B. The Park Service's Construction of Section 103(c) Violates Commitments Made by Congress To Native Corporations.

Enforcing regulations designed for the National Park System on Native Corporations inholdings will disrupt, or even forestall, economic development and daily activities on Native Corporation lands, which were intended to sustain and support Alaska's Native peoples. *See* 43 U.S.C. § 1601 *et seq.; see also City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003).

Yet, because of the Ninth Circuit's holding, which makes a mockery of ANILCA's explicit restrictions on the exercise of federal jurisdiction

over nonfederal lands, federal agencies now have the power to promulgate regulations that require Native Corporations to secure approval from the federal government before landing a plane, building a lodge, going for a hike, picking berries, altering a camping site, or even hunting and fishing *on Native owned lands* located within conservation system units. Brief Amicus Curiae of Arctic Slope Regional Corp. at 14-15. Consequently, the Ninth Circuit's holding is in direct contravention of the unequivocal commitments made to Native Corporations in ANILCA and ANCSA. *See Marsh*, 749 P.2d at 1418 (holding that "Congress intended that the private status of the lands conveyed to [Native Corporations] is to remain unaffected by their inclusion within the exterior boundaries of the conservation system unit").

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In short, even if *Chevron's* step-2 applies, the Park Service's interpretation of the statute is not "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

CONCLUSION

For the foregoing reasons, and those in Sturgeon's brief and the supporting amici briefs, the Ninth Circuit's decision should be vacated.

Respectfully submitted,

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